

No. 83-796

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IN THE

Supreme Court of the United States

October Term, 1983

JERRY HALLORAN,
Petitioner,

vs.

DISPLAY CORPORATION INTERNATIONAL (presently
named DCI MARKETING, INC.), a Wisconsin Corporation,
and LLOYD A. SAUER, Jointly and Severally,
Respondents.

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GOODENOUGH, SMITH & MAY
By: DELMER C. GOWING, III (P14241)

OF COUNSEL:

GODFREY & KAHN, P.C.
WILLIAM H. ALVERSON
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-3500

JOHN A. FORREST (P33318)

Attorneys for Respondents
100 W. Long Lake Road
P.O. Box 541 — Suite 200
Bloomfield Hills, Michigan 48013
(313) 646-9500

QUESTIONS PRESENTED FOR REVIEW

The following question is a clarification of question 5 of Petitioner's Questions Presented for Review:

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ABUSE ITS DISCRETION (a) WHEN IT DISMISSED PETITIONER'S APPEAL FOR WANT OF PROSECUTION; (b) WHEN IT DENIED PETITIONER'S MOTION TO REINSTATE APPEAL; AND (c) WHEN IT DENIED PETITIONER'S PETITION FOR REHEARING EN BANC?

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RULES INVOLVED

Appellant's appeal was dismissed pursuant to 6th Cir. R. 4(f), by John P. Hehman, Clerk of the Court of Appeals for the Sixth Circuit. 6th Cir. R. 4(f) states:

(f) Entry of Orders by the Clerk. The Clerk may prepare, sign, and enter orders or otherwise dispose of the following matters without submission to the Court or a Judge, unless otherwise directed:

(1) Procedural motions as set forth in Rule 8(c) of these rules.

(2) Orders for voluntary dismissal of an appeal or petition or for consent judgment in National Labor Relations Board cases.

(3) Orders for dismissal of appeals or petitions for want of prosecution.

(4) Orders appointing counsel under the Criminal Justice Act of 1964, as amended, in criminal cases appealed in *forma pauperis*, in which the appellant is entitled to the appointment of counsel under the Sixth Circuit Plan for the Implementation of the Criminal Justice Act and in any other case in which an order ordering the clerk to appoint counsel has been entered.

(5) Bill of costs filed pursuant to Rule 39(c), Federal Rules of Appellate Procedure.

(6) A fourteen (14) day extension of time in which to file a petition for rehearing or rehearing *en banc*.

Any party adversely affected by an order so entered shall be entitled to a reconsideration thereof by a judge or judges of the court, if within

ten days of service of notice of entry of such order, such party files a motion for reconsideration giving the grounds therefor.

Subsequent to this order the Court of Appeals exercised its discretionary power to deny Petitioner's request for reinstatement and petition for rehearing en banc.

Petitioner's issues on appeal also involve Fed. R. Evid. 403 and Fed. R. Civ. P. 49(a) which are set forth below:

**RULE 403. EXCLUSION OF RELEVANT EVIDENCE
ON GROUNDS OF PREJUDICE, CONFUSION,
OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**RULE 49. SPECIAL VERDICTS AND INTER-
ROGATORIES**

(a) **SPECIAL VERDICTS.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the

jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATEMENT OF THE CASE

Petitioner originally filed suit in the United States District Court for the Eastern District of Michigan, Southern Division. Plaintiff (Petitioner herein) was a resident of the State of Michigan and Defendants (Respondents herein) were residents of the State of Wisconsin. Petitioner claimed the amount in controversy was over Ten Thousand (\$10,000.00) Dollars. Petitioner also originally made a claim under the Employment Retirement Security Act of 1976.

Petitioner's Complaint stated the following counts: (1) breach of contract; (2) wrongful interference with the acquisition of profit sharing benefits; (3) deprivation of the right to claim a living in the point of purchase business; (4) breach of an implied contract to pay severance pay; and (5) wrongful interference with contractual relations.

By Order dated December 1, 1978, United States District Court Judge James P. Churchill granted Summary Judgment in favor of Respondents on Counts 2 and 5. After a trial on the remaining counts, a jury rendered a verdict of no cause of action. Thereafter, on

May 12, 1980, United States District Court Judge Anna Diggs Taylor entered a Judgment dismissing the case on its merits.

After Judge Anna Diggs Taylor denied his Motion for New Trial, Petitioner attempted to raise the following issues on appeal to the Court of Appeals:

- (a) The alleged error by the District Court in granting Respondent's Motion in Limine;
- (b) The alleged error by the District Court in granting a special verdict;
- (c) The alleged error in the District Court's instructions to the jury;
- (d) The alleged error of the District Court in refusing to grant the jury request to amend or rewrite the special verdict questions.

After at least seven (7) extensions of time had been granted by the Court of Appeals, Petitioner was ordered on September 4, 1982, to file his brief within twenty-one (21) days. After Petitioner's failure to file a brief, the Clerk of the Court of Appeals entered an Order on October 15, 1982, dismissing Petitioner's appeal.

Petitioner thereafter requested reinstatement of his appeal. Petitioner was advised by the Court of Appeals that his request for reinstatement would only be considered after he filed a brief. One month after the dismissal Petitioner filed what purported to be a brief. The Court of Appeals noted that Petitioner's "brief" was virtually the same document Petitioner had filed with the Court of Appeals in April, 1981, clarifying the issues raised on appeal, despite the fact that repeated extensions of time had been given to Petitioner. The Court of Appeals concluded that Petitioner had not demonstrated sufficient cause for his appeal to be reinstated and by Order dated February 1, 1983, denied Petitioner's request.

Petitioner then filed a Motion for a Rehearing en Banc (after twice requesting extensions of time), which motion was denied by Order of the Court of Appeals dated June 16, 1983.

Petitioner has now petitioned this Court for a Writ of Certiorari to review the decision by the Court of Appeals to dismiss his appeal. Petitioner also requests that this Court review the merits of his appeal to the Court of Appeals. No decision on the merits has yet been made by the Court of Appeals on these issues.

SUMMARY OF ARGUMENT

Petitioner's issues on appeal do not present special and important reasons for the granting of a Writ of Certiorari by this Court. Petitioner's case does not require interpretation of important Federal laws. Petitioner's issues involve only discretionary rulings by the Courts below based on factual findings made by those Courts. Also there has not been any departure from the accepted and usual course of judicial proceedings in the Courts below. On the contrary, Petitioner has already been provided every opportunity for a fair and equitable consideration of his case.

ARGUMENT

The issue presently before this Court is whether the disposition of Mr. Halloran's case should be reviewed by this Court. Sup. Ct. R. 17 states that review by this Court on Writ of Certiorari is a matter "of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17 also states that the character of reasons that will be considered in whether to grant a Writ of Certiorari are indicated by the following:

- (a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals;
- (b) When a Federal Court of Appeals has decided a federal question in a way in conflict with a State Court of last resort;
- (c) When a Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;
- (d) When a State Court of last resort has decided a federal question in a way in conflict with the decision of another State Court of last resort or of a Federal Court of Appeals;
- (e) When a State Court or Federal Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The present case does not involve any of the considerations enumerated in Sup. Ct. R. 17, nor does it involve considerations of the same character of those enumerated in Sup. Ct. R. 17.

Petitioner's issues on appeal are: (a) whether the District Court Judge abused her discretion in granting Defendant's (Respondent's) Motion in Limine pursuant to Fed. R. Evid. 403; (b) whether the District Court Judge abused her discretion in requiring the jury to

return only a special verdict in the form of a special written finding upon each issue of fact pursuant to Fed. R. Civ. P. 49(a); (c) whether the District Court Judge abused her discretion when choosing the special verdict questions to be presented to the jury; (d) whether the District Court Judge committed reversible error in her instructions to the jury covering the special verdict questions; and (e) whether the Court of Appeals abused its discretion in dismissing Petitioner's appeal and denying Petitioner's request for reinstatement of the appeal.

As can be seen, all of Petitioner's issues on appeal involve either factual determinations made by the Courts below or the exercise of procedural discretion by the Courts below. According to *R. H. Baker & Co. v Smith-Blair, Inc.*, 331 F.2d 506 (9th Cir. 1964), a trial court has complete discretion as to whether a special verdict or general verdict is to be returned and this discretion extends to determining the form of the special verdict. In *United States v De Vincent*, 546 F.2d 452 (1st Cir. 1976) *cert. denied* 431 U.S. 903 (1977), the Court held that a trial court has broad discretion under Fed. R. Evid. 403. Also, these questions are best decided by the Courts closest to the facts and circumstances of the particular case. *Longenecker v General Motors Corp.*, 594 F.2d 1283 (9th Cir. 1979).

Petitioner's issues on appeal do not involve the interpretation of federal statutes, rules, or regulations. In addition, there has been no gross miscarriage of justice by the Courts below which would require this Court's intervention. Petitioner was afforded his constitutional right to a jury trial on all viable issues raised in his Complaint. The jury returned a verdict of no cause of action and the District Court Judge entered a judgment based on that verdict.

Petitioner has noted various actions by the District Court which he feels are reversible error. However, at the Court of Appeals' level, Petitioner totally failed to perform the duties required of him for the completion of an appeal. Petitioner's Amended Notice of Appeal was filed on January 20, 1981. Petitioner was initially ordered to file his appellate brief by September 21, 1981. Apparently a problem with obtaining a particular transcript caused Petitioner to request numerous extensions of time until finally on August 3, 1982 the Court of Appeals declared that the record on appeal was complete and ordered Petitioner to file his brief by September 7, 1982. A further request by Petitioner for an extension of time in which to file his brief was denied and Petitioner was ultimately ordered to file his brief by October 5, 1982. This Order by the Court of Appeals, dated September 14, 1982, warned Petitioner that failure to file his brief would result in dismissal of his appeal for want of prosecution.

When Petitioner failed to file his brief by October 5, 1982, the Clerk of the Court of Appeals, by Order dated October 15, 1982, dismissed Petitioner's appeal for want of prosecution. Petitioner ultimately did file a document entitled "Brief" which was reviewed by the Court of Appeals. By Order dated February 2, 1983, the Court of Appeals found that Petitioner's brief failed to show how or where the record of the District Court proceedings supported any claims of prejudicial or reversible error. The Court of Appeals further found that Petitioner's brief was virtually the same document that Petitioner had filed in April, 1981, clarifying the issues he had raised on appeal. Based on these findings the Court of Appeals denied Petitioner's request for reinstatement.

As a review of proceedings in the Court of Appeals indicates, Petitioner was afforded every opportunity by

that Court to prosecute his appeal completely. Finally, though, upon Petitioner's repeated failure to perform the duties required of him, the Court of Appeals exercised its discretion and dismissed Petitioner's case. This was an action within the sound discretion of the Court of Appeals notwithstanding the fact that Petitioner was not represented by an attorney. *Baker v United States*, 494 F.2d 508 (5th Cir. 1974). In *Baker* the Court held that it was appropriate for the lower court to dispose of a pro se habeas corpus case summarily where the petitioner, on appeal, failed to file a brief within the time fixed by rule.

CONCLUSION

Since Petitioner has not presented special and important reasons why his Petition for a Writ of Certiorari should be granted, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

GOODENOUGH, SMITH & MAY

By: /s/ DELMER C. GOWING, III (P14241)
JOHN A. FORREST (P33318)

Attorneys for Respondents
100 W. Long Lake Road
P.O. Box 541 — Suite 200
Bloomfield Hills, Michigan 48013
(313) 646-9500

OF COUNSEL:

GODFREY & KAHN, P.C.
WILLIAM H. ALVERSON
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-3500

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